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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1972

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No. 72-1129

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SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD ET AL.,  
*Respondents*

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND  
AMICUS CURIAE BRIEF IN SUPPORT OF REVERSAL**

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

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The State of Maryland Commission on Human Relations and the Women's Law Center hereby respectfully move for leave to file the attached brief *amicus curiae* in this case pursuant to Supreme Court Rule 42(2). The consent of the petitioner has been obtained. The respondent has denied consent.

The interest of the State of Maryland Commission on Human Relations arises because it administers and enforces its state's fair employment practices law which in its relevant parts is identical to Title VII of the

Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e. The issues raised in these proceedings are similar to issues raised before the State Commission. Affirmation of the decision below could result in practices which perpetuate sex discrimination and affect the enforcement responsibilities of the State Commission.

The Women's Law Center is dedicated to securing equal rights for women through law. The Center is presently litigating issues parallel to and dependent on the issues raised in this case.

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**AMICUS CURIAE BRIEF IN SUPPORT OF REVERSAL**

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**OPINIONS BELOW**

The opinion of the United States District Court for the Eastern District of Virginia is reported at 326 F. Supp. 1159 (1971).

The opinion of the United States Court of Appeals, Fourth Circuit, is reported at 474 F.2d 395 (1973).

**JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). Certiorari was granted by this Court on April 23, 1973. 93 S. Ct. 1925 (1973).

**QUESTION PRESENTED**

Is a Chesterfield County School Board regulation which requires that pregnant teachers begin a mandatory leave of absence at least four months prior to the expected birth of the child constitutionally permissible under the equal protection clause of the fourteenth amendment?

**AMICUS CURIAE AUTHORITY**

The State of Maryland Commission on Human Relations and the Women's Law Center file a brief *amicus curiae* in these proceedings pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States. The written consent of the petitioner has been obtained. The respondent has not consented.

**INTEREST OF AMICUS CURIAE**

The State of Maryland Commission on Human Relations administers and enforces state fair employment practices law which in its relevant parts is identical to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. The issues raised in these proceedings are similar to issues raised before the State Commission. Affirmation of the decision below could result in practices which perpetuate sex discrimination and affect the enforcement responsibilities of the State Commission.

The Women's Law Center is dedicated to securing equal rights for women through law. The Center is presently litigating issues parallel to and dependent on the issue raised in this case.

### **STATUTES INVOLVED**

The Civil Rights Act of 1871 provides in relevant part at 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

### **STATEMENT**

Mrs. Susan Cohen was first employed by Chesterfield County School Board (School Board) for the 1968-69 school year, and again for the 1969-70 and 1970-71 school years under similar employment contracts as required by law.

The maternity leave regulations of the School Board provide that notice must be given in writing six months prior to the expected date of birth. Termination of employment of the expectant mother, under the regulations, must occur at least four months before the expected birth. Extensions are possible only in the discretion of the superintendent upon recommendations of the teacher's physician and principal. A leave of absence may be requested and granted to teachers having a record of satisfactory performance, with re-employment guaranteed no later than the first day of the school year following written notice from the physician that the teacher is physically fit and that the child will cause minimal interference with job

responsibilities. All personnel benefits are retained during the leave unless the teacher accepts other employment during that time.

On or about November 2, 1970, in accordance with the regulations of the School Board, Mrs. Cohen informed the School Board in writing that she was pregnant and that the estimated date of delivery was April 28, 1971. She initially requested that she be permitted to continue working until April 1, 1971 and supplied a certificate from her doctor to the effect that she could continue working as long as she chose. This request was denied and she was granted leave effective December 18, 1970, pursuant to the terms and conditions of the maternity leave regulations.

Mrs. Cohen renewed her request before the School Board itself, amending the request to suggest as an alternative leave date January 21, 1971, the end of the first semester of classes she was teaching. The principal of Mrs. Cohen's school had previously requested that she be permitted to teach until the end of the first semester. The renewed request was also denied.

Suit was subsequently brought in United States District Court for the Eastern District of Virginia, 349 F. Supp. 687 (E.D. Va. 1972). Mrs. Cohen complained that the maternity leave regulation of the School Board violated her constitutional rights in that it discriminated against her solely on the basis of her sex, thereby violating the equal protection clause of the fourteenth amendment of the Constitution of the United States. The defendant School Board's action in terminating her employment therefore violated the Civil Rights Act of 1871, 42 U.S.C. § 1983.

The District Court found, upon unrefuted medical evidence, that there was no medical reason for the School Board's regulation, and that, in fact, women are more likely to be incapacitated in the early stages of pregnancy than the last four months. It was also found that there was no psychological reason for the mandatory leave of absence.

Nor did the District Court find any tenable administrative reason for the regulation. The contentions of the School Board for the regulation, such as fear of injury to the fetus and inability to carry out fire drills, were found to be nugatory and not based on any empirical evidence. Neither was there any empirical data to substantiate the School Board's contention that absences increase in the later months of pregnancy.

The conclusion of the District Court was that the maternity leave policy was arbitrary and discriminatory within the proscription of the equal protection clause of the fourteenth amendment. The District Court held that Mrs. Cohen was entitled to her salary, seniority rights, and all other rights and benefits she would have received had she been permitted to teach until April 1, 1971.

The U. S. Court of Appeals for the Fourth Circuit first affirmed the judgment of the District Court, then, on rehearing *en banc* reversed that judgment. 474 F.2d 395 (4th Cir. 1973). It was there held that since a pregnancy regulation did not apply to women in an area in which they compete with men, there was no invidious discrimination. The Court of Appeals concluded that the School Board was justified in its regulation since the nature of pregnancy permits planning

for a period of confinement and assures the opportunity to secure a more permanent replacement. This appeal followed.

### ARGUMENT

#### **I. The Classification and Special Treatment of Pregnant Teachers by the School Board Pursuant To Its Maternity Leave Regulations Constitute Invidious Discrimination Without a Compelling State Interest.**

The maternity leave regulations of the School Board discriminate against Mrs. Cohen because of her sex, and interfere with her rights to work and to have children. The United States Constitution, Amendment XIV, § 1, declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The traditional test of equal protection is to determine whether the classification at issue is "without any rational basis." *Shapiro v. Thompson*, 394 U.S. 618, 638 n. 20 (1969). However, in two special classes of cases, those involving infringement by the state upon "fundamental rights" safeguarded by the Constitution, and those involving "suspect classifications," this Court has identified infringement as invidious discrimination and has employed a much stricter test, in fact, the "strictest test of judicial scrutiny." *Shapiro v. Thompson*, *supra* (fundamental right); *Graham v. Richardson*, 403 U.S. 365 (1971) (suspect classification). Where invidious discrimination is found, under the applicable test, the classification is unconstitutional "unless [it is] shown to be necessary to promote a *compelling* governmental interest." *Shapiro v. Thompson*, *supra*, 394 U.S. at 634 [emphasis in original].

The right to work and the right to have children are fundamental rights safeguarded by the Constitution.

Rights need not be ascribed to any particular constitutional prohibition. *Shapiro v. Thompson, supra*, 394 U.S. at 630 n. 8. It is sufficient to show that the right in question is so elementary as to have been conceived from the beginning as "a necessary concomitant of a stronger Union" created by the Constitution. *United States v. Guest*, 343 U.S. 745, 757-758 (1966). The right to procreate, free from unjustified interference by the state, is certainly such an elementary right, and is necessary to the very existence of the Union. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The right to earn a livelihood is likewise an elementary and necessary right. This Court, in *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952), refused to consider whether an abstract right to public employment exists, but found that the Constitution extended its protection to the public servant whose exclusion was patently arbitrary or discriminatory.

The School Board, in its policy regarding maternity leave, in effect forces the female teacher to choose between procreation and employment. Such a choice not only imposes unconstitutional limitations on each of these rights, but also violates the right of privacy in the marriage relationship recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Subsequent to the decision of the Court of Appeals in this case, this Court, in *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973) in the majority opinion of Brennan J., held that sex is a suspect classification, like classifications based upon race, alienage, and national origin. The Court said, at 93 S. Ct. 1764, 1770:

Moreover, since sex, like race and national origin is an immutable characteristic determined solely

by the accident of birth, the imposition of special disabilities upon members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

Since sex is a suspect classification, any classification based on sex is deemed invidious and "must therefore be subjected to strict judicial scrutiny." *Frontiero v. Richardson*, *supra*, 93 S. Ct. at 1768.

Where a classification is invidious and subjected to strict judicial scrutiny, the classification can be justified only by showing a "compelling state interest." *Shapiro v. Thompson*, *supra*, 394 U.S. at 638. Justification can be found only on a showing of a "clear public danger, actual or impending," and only in cases of "the gravest abuses, endangering paramount interests" is there grounds for limitation. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). No such compelling interest could be shown by respondent in this case.<sup>1</sup> Nor can this case be distinguished, as the Court of Appeals argued, because it is not an area in which the sexes are in competition. The essence of an equal protection violation is the unjustified or unreasonable adverse treatment of an identifiable class of people. A distinction based on competition misses the mark and is meaningless.<sup>2</sup>

<sup>1</sup> See Part II. Not even a rational basis exists for the School Board's regulation regarding maternity leave.

<sup>2</sup> cf. *Stanley v. Illinois*, *supra*. It was there found to be a violation of equal protection to presume that unwed fathers are unfit to raise their children, though clearly there was no competition between wed and unwed fathers.

## II. The Maternity Leave Policy of the School Board Bears No Rational Relationship to a Legitimate State Objective.

The School Boards maternity leave policy constitutes invidious discrimination based on sex and is therefore subject to the "compelling interest" test as set out in *Frontiero v. Richardson, supra*. Even under the traditional, less strict standard of judicial scrutiny, the maternity leave policy of the School Board must be found violative of the Equal Protection Clause. To be valid under the more lenient test:

[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).<sup>3</sup>

The crux of Mrs. Cohen's argument is that to disqualify a physical capable woman from working solely because of a condition related to her sex is unconstitutionally arbitrary.

It cannot be said that the regulation is reasonably based upon a fear for the health and safety of the mother or the child. Under the regulation a pregnant teacher is not permitted to work even with the consent of her physician, consent such as that obtained by Mrs. Cohen.

The argument of the School Board relied on most heavily by the Court of Appeals was the legitimacy of the School Board's concern for preserving continuity of instruction for the children. However, while it is conceded that continuity of instruction is a legitimate concern of the State, the Court of Appeals failed to

<sup>3</sup> See also *Reed v. Reed*, 404 U.S. 71 (1971) quoting with approval the passage from *Royster Guano Co. v. Virginia, supra*.

carry the analysis far enough. It is not enough merely to show a legitimate state objective; it must further be shown, where there is an infringement on individual rights, that the means chosen by the state is reasonably related and bears "a fair and substantial relation to" that objective.

The means chosen by the School Board to achieve its announced objective of continuity of instruction is the inflexible and arbitrary regulation requiring termination of employment at least four months prior to the expected date of birth. The operation of the rule in the case at bar resulted in Mrs. Cohen's termination during the semester rather than at the end of the semester, the more logical time suggested by Mrs. Cohen in her renewed request for an extension. Thus, in this case the state's objective was actually defeated by the regulation. Nor is there any reason to believe the regulation will operate less arbitrarily in other cases.

The medical evidence presented to the District Court fails to support the regulation, and in fact supports the contrary conclusion that pregnant women are more likely to be incapacitated during the early stages of pregnancy than during the last four months.<sup>4</sup> Further, while other illnesses leave no possibility for advance preparation for the teacher's absence, pregnancy generally follows a predictable course, and notice of impending absence based on individual medical considerations is possible far enough in advance to allow school officials more than adequate time to secure a substitute and thereby maintain the desired continuity in instruction.

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<sup>4</sup>326 F. Supp. at 1160.

As was pointed out by the Second Circuit Court of Appeals in *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973),<sup>5</sup> there are other illnesses with accompanying absence that may be planned for in advance, but which are not subjected to a special regulation as is pregnancy. Examples are cases involving voluntary surgery, such as cataract operations. Only males can be subject to the need for prostatectomy, and although notice of the impending absence is possible well in advance, in such a case no medically unnecessary leave of absence is required by the School Board. Female teachers should not be treated differently.

Mere administrative convenience should not be allowed to override the determinative issue, the competence of the individual teacher. To permit the School Board to maintain a maternity leave policy which avoids individual treatment of female teachers and depends on stereotypes to avoid the "inconvenience" of deciding specific cases on their merits is to allow the kind of "procedure by presumption" found constitutionally impermissible in *Stanley v. Illinois*, 405 U.S. 645 (1972). This Court has in the past looked with disfavor on blanket restrictions and insurmountable presumptions by which otherwise qualified individuals may be excluded; this is true particularly where more precise methods of evaluation are available, as they clearly are in this case. *Reed v. Reed*, *supra*; *Stanley v. Illinois*, *supra*; *Carrington v. Rash*, 380 U.S. 89 (1965).

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<sup>5</sup> The facts of *Green* are similar to those in the instant case. The Court of Appeals there found a rule requiring a pregnant teacher to take a leave of absence before she reached the sixth month of her pregnancy unconstitutionally discriminatory.

It is always easier to treat people by presumption than by individualized determination. Administrative speed and efficiency are legitimate governmental objectives, but when speed and efficiency conflict in more than an insignificant way with higher values protected by the Constitution with the rights of the individual protected by the Bill of Rights, they must yield to these higher values. In *Stanley v. Illinois, supra*, this Court said that the Bill of Rights was

designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. 405 U.S. at 656.

In conclusion, there is no justification for treating pregnancy differently from any other medical disability. To single out for unusual treatment pregnant teachers is clearly to violate the prohibitions of the Equal Protection Clause and the Civil Rights Act of 1871, which gives a cause of action to persons who have been deprived of rights granted by the Constitution under color of law. The best medical evidence contradicts the prescription upon which the School Board's policy is based. The regulation fails to bear "a fair and substantial relation" to the objective of maintaining continuity in instruction, and in fact, operates quite arbitrarily in this regard and even contrary to this interest. And finally the rule is unjustifiable on grounds of administrative convenience as that value conflicts with higher values protected by the Constitution and the Bill of Rights and completely fails to consider individuals and individual competency.

**III. The Equal Protection Clause Is at Least as Broad as Title VII of the Civil Rights Act of 1964<sup>6</sup> Which Would Prohibit the Maternity Leave Regulations.**

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964) prohibits discrimination in employment practices on the basis of race, color, religion, national origin, and sex. Pursuant to Title VII the Equal Employment Opportunity Commission, the administrative body charged with enforcement of that Act,<sup>7</sup> has promulgated certain guidelines. As these guidelines are interpretations of a statute by the administrative body charged with enforcement of the statute, they are accorded great weight by the courts. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In its *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604 as amended (March 31, 1972), the Equal Employment Opportunity Commission treats specifically the problem of maternity leave. Section 1604.10, "Employment Policies Relating to Pregnancy and Childbirth," reads in relevant part:

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privi-

<sup>6</sup> As amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103 (1972).

<sup>7</sup> 42 U.S.C. § 2000e-4 (1970).

leges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Section 1604.10 of the *Guidelines* would clearly prohibit a policy, such as that of the School Board, which singled out pregnancy and required an extended leave of absence well in advance of that necessary to the particular case. However, the original statute exempted state agencies and educational institutions from the terms of the Act. 42 U.S.C. § 2000e(b), 42 U.S.C. § 2000e-1. At the time the School Board acted with respect to Mrs. Cohen, the exemption was still in force and she was, therefore, outside the protection of Title VII. This exemption was abolished by amendment on March 24, 1972. 86 Stat. 103 (1972).

Although Congress found the source of power for the enactment of Title VII elsewhere in the Constitution,<sup>8</sup> the theory and policy underlying the Act are the same as those on which the equal protection clause of the fourteenth amendment is based. The 1871 Civil Rights Act, 42 U.S.C. § 1983, gives a cause of action for violations of the equal protection clause. Recent decisions in cases brought pursuant to 42 U.S.C. § 1983 have been based on the reasoning of the case law developed under Title VII of the 1964 Civil Rights Act; i.e., in *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972), in an action brought under 42 U.S.C.

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<sup>8</sup> i.e., in the Commerce Clause. Senate Report No. 872, 88th Congress, 2nd Session (1964).

§ 1983, the court relied on *Griggs v. Duke Power Co.*, *supra*, in defining the permissible limits of testing and selection standards which have a discriminatory impact. In view of the fact that national policy based on the principles underlying the equal protection clause has found expression in the Civil Rights Act of 1964, and further in view of the fact that the area of employment discrimination is governed concurrently by the fourteenth amendment together with 42 U.S.C. § 1983, and Title VII of the Civil Rights Act, the intent and purpose of Congress as expressed in Title VII and the rulings of the enforcing administrative agency are accorded great weight in determining the limits of the equal protection clause. *Chance v. Board of Examiners*, *supra*; *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). The limits of protection should be at least as broad as the statutes enacted by Congress.

**CONCLUSION**

For the reasons stated above, this Court should reverse the decision of the Court of Appeals and reinstate the order of the District Court.

Respectfully submitted,

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